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APPENDIX.

APPLICABLE CONSTITUTIONAL PROVISION.

AMENDMENT XIV, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES.

Amendment XIV.—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES.

1. Section 14 of Article 7 of the Illinois Election Code (Ill. Rev. Stat. 1967, Chap. 46, Sec. 7-14, p. 60, 61).

§ 7—14. State Electoral Board—Meetings—Certification of candidates

The Governor, who shall preside as chairman, the Secretary of State, who shall act as secretary, the Attorney General, the State Treasurer, the Auditor of Public Accounts and the respective chairmen of the State central committees of the 2 leading political parties shall constitute

the State Electoral Board. Not less than 61 days prior to the date of the primary the State Electoral Board shall meet in the office of the Secretary of State, at a time to be fixed by him, and shall examine all petitions filed under this Article 7, in the office of the Secretary of State, and the state Electoral Board shall then certify to the county clerk of each county, the names of all candidates for the President of the United States, and of all candidates for members of the State central committee, and of all candidates for delegates and alternate delegates to National nominating conventions, and of all candidates for nomination for all offices, as specified in the petitions for nomination on file in the office of the Secretary of State, which are to be voted for in such county, stating in such certificates the political affiliation of each candidate for nomination, or for Committeemen, as specified in the petitions. The State Electoral Board shall, in its certificate to the county clerk, certify the names of the offices, and the names of the candidates in the order in which the offices and names (except the names of candidates for State offices, for whom provision is hereinafter made), shall appear upon the primary ballot; such names (except the names of candidates for State offices), to appear in the order in which petitions have been filed in the office of the Secretary of State, except as otherwise provided in this Article.

The names of candidates for State offices shall be certified in the manner following:

The State Electoral Board shall certify to the county clerk of each county of each and every senatorial district, beginning with the first senatorial district, the names of candidates for State offices, in the order in which such names shall appear upon the official primary ballot, in each and every precinct of such senatorial district. In making its certificate to the county clerk of the county or counties in which the first senatorial district is located, the board shall certify to such county clerk, or county clerks, the

names of the offices, and the names of the candidates for such offices in alphabetical order of the first letters of the surnames of such candidates. In certifying the names of candidates for State offices to the county clerk, or county clerks of the counties composing the second senatorial district, the board shall certify the name of the candidate under each office as first which was second in the first senatorial district and the name of the candidate which was first in the first senatorial district shall be last in the second senatorial district, and the name of the candidate which was first in the second senatorial district shall be certified as last in the third senatorial district. The same procedure shall be followed by the board in certifying the names of candidates for State offices to the several county clerks of the several senatorial districts of the State, the intent being that the names of candidates for each of the State offices shall be rotated by senatorial districts.

Not less than 55 days prior to the date of the primary, the county clerk shall certify to the board of election commissioners, if there be any such board in his county, the names of all candidates so certified to him by the State Electoral Board, together with the list of the names of all other candidates in whose behalf petitions have been filed in his office, and in the order so filed. However, he shall not certify the name of any candidate for ward or township committeeman whose petition was held invalid by the hearing boards, provided in Section 7—13 of this Article. Not less than 30 days prior to the date of the primary, the city, village or incorporated town or town clerk, as the case may be, shall also certify to the board of election commissioners, the names of all candidates in whose behalf petitions have been filed in the office of such city, village or incorporated town or town clerk, as the case may be, and in the order so filed.

As amended 1967, May 1, Laws 1967, p. ——, S. B. No. 446, § 1.

2. Section 2 of Article 10 of the Illinois Election Code (Ill. Rev. Stat. 1967, Chap. 46, Sec. 10-2, pp. 388-391).

§ 10-2. "Political party" and "established party" defined —Formation of new party—Petition—Provisional organization—Committeemen

The term "political party," as hereinafter used in this Article 10, shall mean any "established political party," as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party in the manner provided for in this Article 10: Provided, that no political organization or group shall be qualified as a political party hereunder, or given a place on a ballot, which organization or group is associated, directly or indirectly, with Communist, Fascist, Nazi or other un-American principles and engages in activities or propaganda designed to teach subservience to the political principles and ideals of foreign nations or the overthrow by violence of the established constitutional form of government of the United States and the State of Illinois.

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an "established political party" as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, senatorial district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, senatorial district, county, township, school district, park district, municipality, or political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of

officers to serve the respective territorial area of such district, political subdivision or municipality, is hereby declared to be an "established political party" within the meaning of this Article as to such district, political subdivision or municipality.

Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the Secretary of State a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. Any such petition for the formation of a new political party throughout the State, or in any such district or political subdivision, as the case may be, shall declare as concisely as may be the intention of the signers thereof to form such new political party in the State, or in such district or political subdivision; shall state in not more than 5 words the name of such new political party; shall contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held; and, if such new political party shall be formed for the entire State, shall be signed by not less than 25,000 qualified voters: Provided, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State. If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who

voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

The filing of such petition shall constitute the said political group a new political party, for the purpose only of placing upon the ballot at such next ensuing election said list of party candidates for offices to be voted for throughout the State, or for offices to be voted for in such district or political subdivision less than the State, as the case may be under the name of and as the candidates of such new political party. If, at such ensuing election, the candidates of said new political party, or any candidate or candidates of said new political party shall receive more than 5% of all the votes cast at such election, in the State, or in any district or political subdivision of the State, as the case may be, then and in that event, such new political party shall become an established political party within the State or within such district or political subdivision less than the State, as the case may be, in which such candidate or candidates received more than 5% of the votes cast and shall thereafter nominate its candidates for public offices to be filled in the State, or such district or political subdivision of the State, as the case may be, under the provisions of the laws regulating the nomination of candidates of established political parties at primary elections and political party conventions, as now or hereafter in force.

Any such petition shall be filed at the same time and shall be subject to the same requirements and to the same provisions in respect to objections thereto and to any hearing or hearings upon such objections that are hereinafter in this Article 10 contained in regard to the nomination of any other candidate or candidates by petition. If any such new political party shall become an "established political party" in the manner herein provided, the candidate or candidates

of such new political party nominated by the petition hereinabove referred to for such initial election, shall have power to select any such party committeeman or committeemen as shall be necessary for the creation of a provisional party organization and provisional managing committee or committees for such party within the State, or in any district or political subdivision in which said new political party has become established; and said party committeeman or committeemen so selected shall constitute a provisional party organization for said new political party and shall have and exercise the powers conferred by law upon any party committeeman or committeemen to manage and control the affairs of such new political party until the next ensuing primary election at which said new political party shall be entitled to nominate and elect any party committeeman or committeemen in the State, or in such district or political subdivision under any parts of this Act relating to the organization of political parties. 1943, May 11, Laws 1943, vol. 2, p. 1, § 10-2; 1961, Aug. 1, Laws 1961, p. 2489, § 1.

3. Section 3 of Article 10 of the Illinois Election Code (Ill. Rev. Stat. 1967, Chap. 46, Sec. 10-3, pp. 393-394).

§ 10-3. Independent candidates—Nomination papers

Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State. Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for

each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political subdivision in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area; provided, that the maximum number of voters signing such petition may be increased to 25 whenever such amount is greater than the 8% limit hereinabove specified. If no previous general election has been held in a library district for which nominations are being made, such nomination papers shall be signed by not less than 25 qualified voters. Each voter signing a nomination paper shall add to his signature his place of residence, and each voter may subscribe to one nomination for such office to be filled, and no more: Provided that the name of any candidate whose name may appear in any other place upon the ballot shall not be so added by petition for the same office. 1943, May 11, Laws 1943, vol. 2, p. 1, § 10-3; 1947, July 30, Laws 1947, p. 885, § 1; 1951, June 4, Laws 1951, p. 238, § 1; 1961; Aug. 15, Laws 1961, p. 3291, § 1.

4. Section 1253 of the United States Judicial Code (Title 28, U. S. C. Sec. 1253).

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

5. Section 2201 of the United States Judicial Code (Title 28, U. S. C. Sec. 2201).

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85—508, § 12(p), 72 Stat. 349.

6. Section 2202 of the United States Judicial Code (Title 28, U. S. C. Sec. 2202).

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

7. Section 2281 of the United States Judicial Code (Title 28, U. S. C. Sec. 2281).

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district

court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

8. Section 2284 of the United States Judicial Code (Title 28, U. S. C. Sec. 2284).

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an

interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201.

RELEVANT DOCKET ENTRIES.

1. Complaint with Exhibit A attached filed August 22, 1968.
2. Notice of Motion and Motion requesting the convening of a Three-Judge Court filed August 26, 1968.
3. Order of Chief Judge William J. Campbell on August 26, 1968 continuing to September 10, 1968 Motion to advise the Chief Judge of the Court of Appeals of the Need for a Three-Judge Court.
4. Notice of Motion and Motion to Dismiss filed September 7, 1968 by defendants Adlai E. Stevenson, III and William G. Clark.
5. Order of Judge William J. Lynch on September 10, 1968 to continue cause to September 11, 1968 for oral arguments on whether the pleadings raise the necessary constitutional questions which require hearing by a Three-Judge Court.
6. Order of Judge William J. Lynch on September 11, 1968 requesting the Chief Judge of the Court of Appeals convene a Three-Judge Court.
7. Order of Chief Judge Latham Castle on September 18, 1968 designating Honorable John S. Hastings, Circuit Judge, Honorable Bernard M. Decker, District Judge and Honorable William J. Lynch, District Judge to serve as members of a Three-Judge Court.
8. Order of Judge William J. Lynch on September 18, 1968 requiring memoranda or briefs be filed with Judge Lynch's Minute Clerk not later than 4:00 P. M., September 26, 1968.
9. Notice of Motion and Motion for Preliminary Injunction filed September 20, 1968.

10. Order of William J. Lynch on September 20, 1968 filing the Motion for Preliminary Injunction.
11. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for a Preliminary Injunction filed September 26, 1968.
12. Defendants' Brief in Support of Motion to Dismiss filed September 26, 1968.
13. Order of Judges Hastings, Decker and Lynch on October 1, 1968 denying prayer for temporary injunction, denying prayer for declaratory judgment and dismissing the complaint for failure to state a cause of action.
14. Memorandum of Decision filed October 3, 1968.
15. Plaintiffs' Notice of Appeal to the Supreme Court of the United States filed October 4, 1968.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

No. 68 C 1569.

JAMES L. MOORE, A. A. RAYNER, JR., QUENTIN D. YOUNG, CLYDE EXSON, PEGGY SMITH MARTIN, DAVID R. MEADE, LUSTER H. JACKSON, LUCY MONTGOMERY, STEWART D. ROBERTS, CHARLES W. MARSHALL, MAYA FRIEDLER, DONALD W. McLEOD, FREDERICK H. ELLIS, JR., NICHOLAS N. CHERNIAVSKY, ROBERT S. EASTON, ROBERT HUNTER, DAVID E. CHRISTENSEN, PAUL RUSSELL WIGFIELD, MACK G. CROSBY, JULIA FAIRFAX, FLORENCE SOLOWAY, VIRGINIA N. BALETTO, GEORGE E. DIMITROFF, WILLIAM COUSINS, JR., WILLIAM B. McCLINTON, JR., MERRILL HARMIN,

Plaintiffs,

vs.

SAMUEL SHAPIRO, individually and as Governor of the State of Illinois, PAUL POWELL, individually and as Secretary of State of the State of Illinois, WILLIAM G. CLARK, individually and as Attorney General of the State of Illinois, ADLAI E. STEVENSON III, individually and as Treasurer of the State of Illinois, MICHAEL J. HOWLETT, individually and as Auditor of Public Accounts of the State of Illinois, JAMES A. RONAN, individually and as Chairman of the Democratic State Central Committee for the State of Illinois, and VICTOR L. SMITH, individually and as Chairman of the Republican State Central Committee for the State of Illinois,

Defendants.

COMPLAINT.

The Plaintiffs allege as follows:

1. This is an action of a civil nature brought under the Declaratory Judgment Act of the United States (Secs.

2201 and 2202 of Title 28 of the United States Code), providing for the declaration of rights and other relief.

2. This Court has original jurisdiction of this action under the provisions of Section 1343 of Title 28 of the United States Code.

3. The Plaintiffs are citizens of the United States and of the State of Illinois, residing in the State of Illinois, and are independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois to be voted on at the general election to be held on November 5, 1968.

4. The Defendants Shapiro, Powell, Clark, Stevenson, and Howlett are state officers of the State of Illinois, who, together with Defendants Ronan and Smith, the respective Chairmen of the Democratic and Republican State Central Committees, constitute the State Electoral Board. It is the duty of such Board under Article 10 of the Illinois Election Board to certify to the County Clerks the names of candidates entitled to appear on the official ballots, and where objections to nominating petitions are filed to pass upon the validity and sufficiency of the nominating petitions. The State Electoral Board is constituted under Article 7 of the Illinois Election Code.

5. Plaintiffs have had printed petitions for their nomination as independent candidates for the offices of Presidential Electors which were circulated in order to obtain not less than 25,000 signatures of qualified voters in the State of Illinois. Such petitions, containing the names of not less than 26,500 qualified voters who desire to have plaintiffs nominated as independent candidates for the offices of Presidential Electors were filed by Plaintiffs with the Defendants, who constitute the State Electoral Board, on August 5, 1968.

6. In order to qualify as independent candidates for the

offices of Presidential Electors to be voted on at the November 5, 1968 general election, Plaintiffs must comply with the provisions of Article 10 of the Illinois Election Code, and particularly Section 3 thereof. Among other things, they were required to file on or before August 5, 1968, nomination petitions bearing the signatures of 25,000 qualified voters. Included in the total of 25,000 must be the signatures of not less than 200 qualified voters from each of at least 50 of the 102 counties in the State of Illinois. The provision of Section 3 of Article 10 of the Illinois Election Code requiring at least two hundred (200) valid signatures from each of fifty (50) counties was added by amendment in 1935, the previous requirement being only a total of 25,000 valid signatures.

7. On August 16, 1968, the State Electoral Board met and determined that Plaintiffs' petitions were insufficient for the sole reason that the requirement of 200 signatures from each of not less than fifty (50) counties had not been met. A copy of the Board's determination is attached hereto and made a part hereof as Exhibit A.

8. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935, requiring at least 200 signatures from each of not less than 50 counties, in view of the marked disparity in the population of the 102 counties of the State of Illinois, is unconstitutional as constituting an arbitrary, unreasonable, and discriminatory restriction on the right of qualified voters of the State of Illinois to nominate and vote for independent candidates of their own choice, in violation of the United States Constitution.

9. Although more than half the total population and more than half the registered voters of the State of Illinois reside in one county, Cook County, this provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 prevents qualified voters in Cook

County from nominating independent candidates for statewide office, including Presidential Electors.

10. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 prevents 61 per cent of the State's registered voters who reside in Cook, Du Page, Lake, Madison, and St. Clair Counties, the five most populous counties of the State of Illinois, from nominating independent candidates for statewide office, including Presidential Electors.

11. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 prevents 93.4 per cent of the State's registered voters who reside in Cook, Du Page, Lake, Madison, St. Clair, Adams, Bureau, Champaign, Christian, Clinton, Coles, DeKalb, Franklin, Fulton, Hancock, Henry, Iroquois, Jackson, Jefferson, Kane, Kankakee, Knox, La Salle, Lee, Livingston, Logan, Macon, Macoupin, Marion, McDonough, McHenry, McLean, Montgomery, Morgan, Ogle, Peoria, Randolph, Rock Island, Saline, Sangamon, Shelby, Stephenson, Tazewell, Vermillion, Whiteside, Will, Williamson, Winnebago and Woodford, the forty-nine most populous counties of the State of Illinois, from nominating independent candidates for statewide office, including Presidential Electors.

12. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 would permit 25,000 qualified voters properly distributed among at least 50 of the 53 least populous counties of the State of Illinois to nominate independent candidates for statewide office in the State of Illinois, despite the fact that said 53 counties contain only 6.6 per cent of the registered voters of the entire State.

13. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 is unconstitutional, being in violation of Amendment XIV

to the United States Constitution, particularly the privileges and immunities, equal protection of the laws, and due process clauses, and its enforcement should therefore be enjoined.

14. Apart from this provision of Section 3 of Article 10 of the Illinois Election Code requiring at least two hundred (200) valid signatures from each of fifty (50) counties, the Defendants, and each of them, would have been required by statute to perform their official duties of certifying to the County Clerks for purposes of the November 5, 1968 general election the names of independent candidates for statewide office, including independent candidates for the offices of Presidential Electors, who filed proper nominating petitions containing the signatures of 25,000 qualified voters.

15. Apart from the provision of Section 3 of Article 10 of the Illinois Election Code requiring at least two hundred (200) valid signatures from each of fifty (50) counties, the Plaintiffs, by complying with all other and valid provisions of the Election Code, would be entitled to have their names certified to the County Clerks for the November 5, 1968 general election as independent candidates for the offices of Electors of President and Vice-President of the United States.

16. By reason of the provision of Section 3 of Article 10 of the Illinois Election Code requiring at least two hundred (200) valid signatures from each of fifty (50) counties, the Plaintiffs are threatened with the deprivation of valuable rights guaranteed by the United States Constitution.

17. Unless this Court grants promptly the declaratory and equitable relief herein requested, the constitutional rights of Plaintiffs may be completely frustrated and destroyed, and Plaintiffs have no adequate remedy at law.

18. Inasmuch as the date of the general election concerning which Plaintiffs' rights will be jeopardized, November 5, 1968, is only about two and one-half months distant, an emergency exists requiring the earliest possible consideration and determination of the important constitutional issues presented by this Complaint, an emergency, which, by involving the right to nominate and vote for candidates for a Federal office, is of paramount interest and importance to every citizen of the United States residing in the State of Illinois.

Prayer for Relief.

Wherefore, Plaintiffs respectfully pray that this Court take and assume jurisdiction of this action and of the subject matter thereof and of the legal controversies presented by this Complaint; and that, after hearing, the Court by Declaratory Judgment or Decree declare the rights and other legal relations of the Plaintiffs with respect to the matters pleaded above as authorized by Sec. 2201 of the Judicial Code.

And particularly Plaintiffs pray that this Court enter a Declaratory Judgment holding and declaring that the provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 requiring for a valid nomination petition at least two hundred (200) signatures of qualified voters from each of at least fifty (50) counties is unconstitutional in violation of the United States Constitution, and particularly in violation of Amendment XIV, by reason of constituting an arbitrary, unreasonable and discriminatory restriction on the right of qualified voters of the State of Illinois to nominate and vote for candidates of their own choice, and is therefore null and void and of no effect; holding and declaring that the decision of the State Electoral Board with respect to the insuffi-

ciency of the nomination papers Plaintiffs have filed based upon said unconstitutional provision of Section 3 of Article 10 of the Illinois Election Code is null and void and of no effect; and holding and declaring that the nominating papers of Plaintiffs, duly signed by at least 25,000 qualified voters of the State of Illinois, are valid and sufficient at law to nominate Plaintiffs as independent candidates for the offices of electors of President and Vice-President of the United States from the State of Illinois to be voted on throughout the State of Illinois at the general election to be held on November 5, 1968, and to have their names certified to the County Clerks for such purpose.

And Plaintiffs respectfully pray that this Court, after a hearing, grant further relief, as authorized by Sec. 2202 of the Judicial Code, by way of an order or decree, enjoining the Defendants and each of them, their agents, deputies, and assistants, and their successors in office, from declining or refusing to certify to the County Clerks throughout the State of Illinois for purposes of the November 5, 1968 general election the names of the Plaintiffs as independent candidates for the offices of electors of President and Vice-President of the United States from the State of Illinois in accordance with the applicable provisions of the Illinois Election Code.

And Plaintiffs further pray that this Court grant such other and additional relief as may be just and proper.

REQUEST FOR THREE-JUDGE COURT.

By virtue of the fact that Plaintiffs are asking that the enforcement of a state statute be enjoined on the ground that that statute is unconstitutional, Plaintiffs request that a three-judge court be convened at the earliest possible opportunity to hear this cause, pursuant to Sections 2281 and 2284 of the Judicial Code.

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RICHARD L. MANDEL,
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EXHIBIT A

State Electoral Board Meeting
August 16, 1968

Petition of Nomination of Independent Candidates for the Offices of Electors of President and Vice President of the United States from the State of Illinois

The statutory provision of Chapter 46, Section 10-3, nomination of independent candidates to be filled by the voters of the State at large, the petition signature requirements are as follows: "* * 25,000 signatures, 200 qualified voters from each of at least 50 counties within State * *."

Upon examining said petition to see if it meets the statutory requirements, it is noted that said petition does not contain signatures of 200 qualified voters from each of at least 50 counties within the State. Said petition only contains 24 counties with over 200 signatures.

Therefore, said petition does not meet with the requirements of Section 10-3 as set out above and is not in apparent conformity with the provisions of the Election Code, and, we order that the following set of Electors of President and Vice President of the United States from the State of Illinois, not be certified to the county clerks for the November 5, 1968 General Election.

Name, Address

A. A. Rayner, Jr., 318 E. 71st Street, Chicago, Illinois
Quentin D. Young, 1418 E. 55th Street, Chicago, Illinois
Clyde Exson, 1152 W. Marquette Road, Chicago, Illinois
Peggy Smith Martin, 6810 S. Loomis Boulevard, Chicago, Illinois
David R. Meade, 4142 Rose Avenue, Western Springs, Illinois
Luster H. Jackson, 3450 W. Jackson Boulevard, Chicago, Illinois
Lucy Montgomery, 1000 N. Lake Shore Plaza, Chicago, Illinois
Stewart D. Roberts, 520 N. East Avenue, Oak Park, Illinois
Charles W. Marshall, 4933 Jerome Street, Skokie, Illinois
Maya Friedler, 610 Forest Avenue, Evanston, Illinois
Donald W. McLeod, 6204 Fairmount Avenue, Downers Grove, Illinois
Frederick H. Ellis, Jr., 1173 W. Stephenson Street, Freeport, Illinois
Nicholas N. Cherniavsky, 7704 Randy Road, Rockford, Illinois
Robert S. Easton, 418 E. High Point Road, Peoria, Illinois
Robert Hunter, Route 1, Makanda, Illinois
David E. Christensen, 908 Glenview Drive, Carbondale, Illinois

Paul Russell Wigfield, 87 Thomas Terrace, Edwardsville, Illinois
James L. Moore, 3435 S. Paulina Street, Chicago, Illinois
Mack G. Crosby, 5000 S. Wells Street, Chicago, Illinois
Julia Fairfax, 121 S. Central Park Boulevard, Chicago, Illinois
Florence Soloway, 6 Warwick Court, Park Forest, Illinois
Virginia N. Baletto, 8817 S. Ada Street, Chicago, Illinois
George E. Dimitroff, 1866 Indiana Drive, Galesburg, Illinois
William Cousins, Jr., 1745 E. 83rd Place, Chicago, Illinois
William B. McClinton, Jr., 833 W. Buena Avenue, Apt. 703, Chicago, Illinois
Merrill Harmin, Route 5, Box 147A, Edwardsville, Illinois

Done at Springfield, this 16th day of August, A. D. 1968.

STATE ELECTORAL BOARD,
/s/ SAMUEL H. SHAPIRO,
Governor, Chairman.

/s/ PAUL POWELL,
Secretary of State, Secretary.

/s/ WILLIAM G. CLARK,
Attorney General.

/s/ ADLAI E. STEVENSON, III,
State Treasurer.

/s/ MICHAEL J. HOWLETT,
Auditor of Public Accounts.

/s/ JAMES A. RONAN,
Chairman of State Central Committee, Democratic Party.

/s/ VICTOR L. SMITH,
Chairman of State Central Committee, Republican Party.

(Jurat and affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois.

(Title omitted in printing.)

NOTICE OF MOTION.

Hon. Samuel Shapiro,
160 North La Salle Street,
Chicago, Illinois,
Hon. Paul Powell,
188 West Randolph Street,
Chicago, Illinois,
Hon. Michael J. Howlett,
160 North La Salle Street,
Chicago, Illinois,
Hon. William G. Clark,
160 North La Salle Street,
Chicago, Illinois,
Hon. Adlai E. Stevenson, III,
160 North La Salle Street,
Chicago, Illinois,
Mr. James A. Ronan,
77 West Washington Street,
Chicago, Illinois,
Mr. Victor L. Smith,
105 West Madison Street,
Chicago, Illinois.

Please take notice that the undersigned shall on August 26, 1968 at the hour of 10:00 A. M. or as soon thereafter as counsel may be heard, appear before The Honorable Edwin A. Robson, Room 2346, U. S. Courthouse and Federal Office Building, Chicago, Illinois, or such other judge who may be sitting in his place and stead, and then and there present the attached motion.

RICHARD F. WATT,
One of Plaintiff's Attorneys.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

MOTION.

Plaintiffs, by and through their attorneys, Richard F. Watt, Sheli Z. Rosenberg, Richard C. Mandel, hereby request that this Court promptly advise the Chief Judge of the Court of Appeals for the Seventh Circuit of the application for injunctive relief set forth in the Complaint, to the end that a three-judge court be convened at the earliest possible opportunity to hear this cause pursuant to Sections 2281 and 2284 of the Judicial Code.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
RICHARD L. MANDEL,
By /s/ RICHARD F. WATT,
Their Attorneys.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
105 West Adams Street,
Chicago, Illinois 60603,

RICHARD L. MANDEL,
Ten South La Salle Street,
Chicago, Illinois 60603.

(Affidavit of service omitted in printing.)

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

Name of Presiding Judge, Honorable William J. Campbell, Chief Judge.

No. 68 C 1569 Date August 26, 1968

Title of Cause

Moore *vs.* Shapiro, et al.

Brief Statement of Motion

That the Chief Judge of the Court of Appeals for the Seventh Circuit be promptly advised of the application for injunctive relief set out in the Complaint so that a three-judge court can be convened.

Names and Addresses of moving counsel

Richard F. Watt and Sheli Z. Rosenberg,
105 West Adams Street,
Plaintiffs.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Defendants:

Hon. Samuel Shapiro, Governor,
160 North La Salle Street,

Hon. Paul Powell, Secretary of State,
188 West Randolph Street,

Hon. Michael J. Howlett, Auditor of Pub. Accounts,
160 North La Salle Street,

Hon. Adlai E. Stevenson, III, State Treasurer,
160 North La Salle Street,

Mr. James A. Ronan,
77 West Washington Street,

Mr. Victor L. Smith,
105 West Madison St.

Motion to advise the Chief Judge of the Court of Appeals is continued to September 10, 1968 before Judge Lynch.

W. J. C.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

NOTICE OF MOTION.

To: Richard F. Watt and Sheli Z. Rosenberg
105 W. Adams Street
Chicago, Illinois

Richard L. Mandel
10 S. LaSalle Street
Chicago, Illinois

Please take Notice that the undersigned will bring the Motion set forth below on for hearing before the Honorable William J. Lynch, District Judge, or such other judge as may be sitting in his place, in the courtroom usually occupied by him in the Federal Building, Chicago, Illinois, on the 10th day of September, 1968, at 10:00 A.M., or as soon thereafter as counsel can be heard.

MOTION.

Defendants Adlai Stevenson, III, as Treasurer of the State of Illinois and William G. Clark, as Attorney General of the State of Illinois, by William G. Clark, Attorney General, move the Court to dismiss the action for the reason that the complaint fails to state a claim against defendants upon which relief can be granted.

WILLIAM G. CLARK,
Attorney General of
the State of Illinois,
160 N. LaSalle Street,
Chicago, Illinois 60601,
346-2000.

THOMAS E. BRANNIGAN,
Assistant Attorney General,
Of Counsel.

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

Name of Presiding Judge, Honorable William J. Lynch.

Cause No. 68-C-1569 Date Sep. 10, 1968

Title of Cause

Moore v. Shapiro, et al.

Brief Statement of Motion

That the Chief Judge of the Circuit be promptly advised of the application for injunctive Relief so 3-Judge Court can be Convened.

Names and Addresses of moving counsel

Richard F. Watt and Sheli Z. Rosenberg—105 W. Adams St.

Order cause cont'd to Sept. 11, 1968, 9:30 A.M. for arguments on whether the pleadings raise the kind of constitutional questions which require hearing by a Three-Judge Court.

Sep 10 1968—WJL

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

Name of Presiding Judge, Honorable William J. Lynch.

Cause No. 68-C-1569 Date Sept. 11, 1968

Title of Cause

Moore, et al. v. Shapiro, et al.

Brief Statement of Motion

Hearing Re: Convening of 3-Judge Court and Defendants' Motion to Dismiss

Names and Addresses of moving counsel

Wm. G. Clark (Brannigan), Attorney General, 160 N. LaSalle St., Chicago., Ill.
Representing Rep. certain defendants.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Richard F. Watt and Sheli Z. Rosenberg, 105 W. Adams, Chicago, Ill.
Rep. certain plaintiffs Richard L. Mandel, 10 So. LaSalle, Chicago, Ill.
Rep. certain plaintiffs.

Arg'ts heard and concluded. Order Motion to request the Chief Judge of the Circuit to convene a Three-Judge Court granted.

WJL

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

The undersigned, Chief Judge of the Seventh Circuit, having been notified by the Honorable William J. Lynch, United States District Judge for the Northern District of Illinois, of the filing of the above entitled cause, does hereby, pursuant to Title 28, U. S. C. § 2284, designate the

HONORABLE JOHN S. HASTINGS

a United States Circuit Judge for the Seventh Judicial Circuit, and the

HONORABLE BERNARD M. DECKER

a United States District Judge for the Northern District of Illinois, to serve with the

HONORABLE WILLIAM J. LYNCH

as members of a three-judge United States District Court to hear and determine the above entitled action or proceeding.

Dated this 12th day of September, 1968.

LATHAM CASTLE,
Chief Judge of the Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois.

(Title omitted in printing.)

ORDER.

Memoranda or briefs of law in the above entitled cause are to be filed by the parties with Judge Lynch's Minute Clerk not later than 4:00 P.M. on September 26, 1968.

ENTER:

WILLIAM J. LYNCH,
Judge.

Dated—September 18, 1968.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois.

(Title omitted in printing.)

NOTICE OF MOTION.

To: Hon. Samuel Shapiro
160 North LaSalle Street
Chicago, Illinois

Hon. Paul Powell
188 West Randolph Street
Chicago, Illinois

Hon. Michael J. Howlett
160 North LaSalle Street
Chicago, Illinois

Mr. James A. Ronan
77 West Washington Street
Chicago, Illinois

Mr. Victor L. Smith
105 West Madison Street
Chicago, Illinois

Hon. William G. Clark
Attorney for William G. Clark
Attorney General and

Hon. Adlai E. Stevenson, III
160 North LaSalle Street
Chicago, Illinois

Please take notice that the undersigned shall on September 20, 1968 at the hour of 10:00 A. M., or as soon thereafter as counsel may be heard, appear before The Honor-

able William J. Lynch, Room 1919, U. S. Courthouse and Federal Office Building, Chicago, Illinois, or such other judge who may be sitting in his place and stead, and then and there present the attached motion.

/s/ RICHARD L. MANDEL,
One of Plaintiff's Attorneys.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
105 West Adams Street,
Chicago, Illinois 60603.

RICHARD L. MANDEL,
10 South LaSalle Street,
Chicago, Illinois 60603.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

MOTION FOR PRELIMINARY INJUNCTION.

Now come Plaintiffs in the above entitled action, by their attorneys, and move the court for the entry of a preliminary injunction and temporary relief enjoining the Defendants and each of them, their agents, deputies, and assistants, and their successors in office as follows:

1. From declining or refusing to certify to the County Clerks throughout the State of Illinois for purposes of the November 5, 1968 general election the names of the Plaintiffs, as independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois, or the names of Plaintiffs' candidates for the offices of President and Vice-President of the United States, in accordance with the applicable provisions of the Illinois Election Code;

2. To certify to the County Clerks throughout the State of Illinois the names of Plaintiffs as independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois, or the names of Plaintiffs' candidates for the offices of President and Vice-President of the United States, and

3. To take such other action as shall be necessary to insure the names of the Plaintiffs as independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois, or the names of Plaintiffs' candidates for the offices of President and Vice-President of the United States, shall be listed

on all ballots and voting machines for purposes of the general election to be held on November 5, 1968.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
RICHARD L. MANDEL,
IRA A. KIPNIS,
By RICHARD L. MANDEL,
Attorneys for Plaintiffs.

(Affidavit of service omitted in printing.)

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

Name of Presiding Judge, Honorable William J. Lynch

Cause No. 68 C 1569 Date September 20, 1968

Title of Cause

Moore et al. v. Shapiro et al.

Brief Statement of Motion

Motion for Preliminary Injunction

Names and Addresses of moving counsel and the parties they represent

Ira Kipnis, 10 South LaSalle Street, Chicago; Richard Mandel, 10 South LaSalle Street, Chicago; Richard F. Watt and Sheli Z. Rosenberg, 105 West Adams Street, Chicago,

Representing plaintiffs.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Attorney General William F. Clark, 160 North LaSalle Street, Chicago, Illinois,

Representing certain defendants.

Motion for Preliminary Injunction filed.

J. L.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

STATEMENT OF THE CASE.

This is a suit for Declaratory Judgment under Section 2201 of the Judicial Code and for injunctive relief as authorized by Section 2202 of the Judicial Code brought by twenty-six independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois against the members of the State of Illinois Electoral Board.

Electors of President and Vice-President of the United States are to be voted on at the General Election to be held on November 5, 1968. On August 5, 1968, pursuant to Article 10 of the Illinois Election Code, Plaintiffs filed petitions with Defendants containing the names of 26,500 qualified voters who desired to have Plaintiffs nominated as independent candidates for the offices of Presidential Electors. Prior to 1935, Section 3 of said Article 10 required that at least 25,000 electors sign a petition to nominate such candidates. In 1935 that statute was amended. The requirement of at least 25,000 signatures was retained, but the following proviso was added:

> "Provided, that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties." (Ill. Rev. Stat. 1967, Chap. 46, sec. 10-3).

This section provides the only means whereby qualified voters in Illinois can nominate independent candidates for statewide office. An identical place of residence requirement is contained in Section 2 of Article 10 with respect to nominating candidates of a new political party for statewide office.

On August 16, 1968, Defendants ordered that Plaintiffs not be certified to the county clerks for the November 5, 1968 General Election on the sole ground that the petition

> "does not contain signatures of 200 qualified voters from each of at least 50 counties within the State. Said petition only contains 24 counties with over 200 signatures. Therefore, said petition does not meet with the requirements of Section 10-3. . . ." (Exhibit A of Complaint.)

On August 22, 1968, the Complaint in this cause was filed and assigned to Judge William J. Lynch. The Complaint prays for a Declaratory Judgment holding and declaring that the amendment to Section 3 of Article 10 requiring 200 signatures from each of at least 50 counties is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution and holding and declaring that the decision of the State Electoral Board with respect to the insufficiency of the nominating petitions is null and void, and that such petitions are valid and sufficient at law to have Plaintiffs' names certified to the county clerks as candidates for the offices of Electors of President and Vice-President. The Complaint further prays for a decree, under Section 2202 of the Judicial Code, enjoining defendants from refusing to certify plaintiffs to the county clerks for such purpose. Finally, the Complaint requested that a three-judge court be convened at the earliest possible opportunity pursuant to Sections 2281 and 2284 of the Judicial Code since Plaintiffs are asking that enforcement of a state statute be enjoined.

On August 26, 1968, pursuant to notice of motion mailed to defendants on August 22, attorneys for Plaintiffs appeared before Chief Judge William J. Campbell, who was hearing emergency motions, and moved that the District Court advise the Chief Judge of the Court of Appeals for the Seventh Circuit of said application for injunctive relief to the end that a three court judge be convened pursuant to Sections 2281 and 2284 of the Judicial Code. Chief Judge Campbell declined to grant relief and set the motion down for hearing before Judge Lynch fifteen days thereafter on September 10. Judge Lynch heard and granted the motion on September 11.

A preliminary injunction is sought because of the relatively short time remaining before the General Election and because time must be allowed for printing the ballots.

ARGUMENT.

I.

The District Court has jurisdiction of this cause and has the authority to grant the declaratory and injunctive relief prayed for in the complaint.

The District Court has jurisdiction of this cause under Section 1343 of the Judicial Code which gives it original jurisdiction of any civil action:

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Under this provision, allegation and proof of jurisdictional amount are not necessary. *Hague* v. *C. I. O.*, 307 U. S. 496, 506-13 (1939).

Plaintiffs' cause of action arises primarily under the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution. Defendants are acting under color of the 1935 amendment to Section 3 of Article 10 of the Illinois Election Code.

The Complaint states a cause of action of a civil nature under the Declaratory Judgment Act, Section 2201 of the Judicial Code which empowers any court of the United States:

> "In cases of actual controversy within its jurisdiction . . . (to) declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought."

The District Court is authorized to grant the injunctive relief prayed for in the Complaint by Section 2202 of the Judicial Code which provides:

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

The Complaint presents an actual controversy between Plaintiffs who seek to be certified to the county clerks so that their names will appear on the ballot for the November 5, 1968 General Election and Defendants who refuse to do so under a provision of the Illinois Election Code which Plaintiffs contend is unconstitutional.

The cases of *Baker* v. *Carr*, 369 U. S. 186 (1962), *Gray* v. *Sanders*, 372 U. S. 368 (1963) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), as well as the many election cases which have followed, have settled that this Court has juris-

diction of a suit such as this which attacks state statutes as unconstitutional on the ground that it deprives persons of equal protection of the laws by debasing and diluting their right to nominate and vote; that such suits state a justiciable cause of action; that persons such as Plaintiffs have standing in such suits to challenge state statutes as unconstitutional for violating the Fourteenth Amendment; and that declaratory and injunctive relief are appropriate remedies in such suits.

II.

The 1935 amendment to Section 3 of Article 10 of the Election Code requiring 200 signatures from each of 50 counties constitutes an arbitrary, unreasonable, and discriminatory restriction on the right of Illinois voters to nominate and vote for candidates of their own choice.

This requirement was added by amendment in 1935. *Laws*, 1935, p. 789. Before that amendment, the signatures required to nominate independent candidates for statewide offices, and for presidential electors, were counted on a statewide basis and only in terms of the total to be obtained: 25,000 signatures of qualified voters in the state. The requirement for nominating candidates for a new political party was identical.

The 1935 amendment added an additional and weighted requirement based on the place of residence of the registered voters. The 1935 amendment made it mandatory that the 25,000 registered voters meet a further, and, in view of the population distribution in Illinois, highly unequal requirement as to their place of residence within the statewide geographical unit for which candidates were to be elected. The 25,000 signatures must include those of at least 200 registered voters from each of 50 counties. In

other words, under the 1935 amendment, the signatures of neither 25,000 registered voters nor of 4,000,000 registered voters will satisfy the statutory requirement for nomination of independent or new-party candidates unless they meet place of residence requirements contrary to the population-based requirements of the Fourteenth Amendment.

The distribution of population among the 102 Illinois counties shows the extent to which the 1935 amendment debases and dilutes the right of qualified voters to participate in the electoral process.

More than 50 per cent of the total Illinois population and more than 50 per cent of the Illinois registered voters reside in *one* county, Cook County.

Approximately 61 per cent of the Illinois registered voters reside in the state's *five* most populous counties: Cook, DuPage, Lake, Madison, and St. Clair.

Approximately 93.4 per cent of the Illinois registered voters reside in the state's forty-nine most populous counties: Cook, DuPage, Lake, Madison, St. Clair, Adams, Bureau, Champaign, Christian, Clinton, Coles, DeKalb, Franklin, Fulton, Hancock, Henry, Iroquois, Jackson, Jefferson, Kane, Kankakee, Knox, La Salle, Lee, Livingston, Logan, Macon, Macoupin, Marion, McDonough, McHenry, McLean, Montgomery, Morgan, Ogle, Peoria, Randolph, Rock Island, Saline, Sangamon, Shelby, Stephenson, Tazewell, Vermillion, Whiteside, Will, Williamson, Winnebago, and Woodford.

Approximately 6.6 per cent of Illinois registered voters reside in the *fifty-three* remaining counties.

The 1935 amendment thus prevents the majority of the state's registered voters who reside in Cook County from nominating independent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment also prevents the 61 per cent of

the state's registered voters who reside in Cook, DuPage, Lake, Madison, and St. Clair Counties from nominating independent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment even prevents the 93.4 per cent of the state's registered voters who reside in the state's forty-nine most populous counties from nominating independent candidates for Presidential Electors and statewide offices.

But the 1935 amendment permits 25,000 of the remaining 6.6 per cent of the registered voters properly distributed among fifty of the fifty-three least populous counties to nominate such candidates or to form such a new party.

The effect of the 1935 amendment is drastically to debase the weight of a qualified voter in a populous county as against the weight of a qualified voter in the less populated counties. No number of additional signatures over and above the required 200 in a populous county can overcome the lack of 200 in one of the less populated counties. One qualified voter does not have the same right to nominate as every other qualified voter. His signature on a nominating petition counts only if he resides in the right county. And the smaller the population of the county in which he resides, the more his signature counts.

The grotesque nature of the 1935 amendment to Article 10 of the Illinois Election Code is illustrated by the fact that the voters of Cook County, since they outnumber the voters of all the rest of the state put together, could elect the Presidential Electors, a United States Senator, and various statewide officers in the face of the united opposition of the voters of the other 101 counties. Indeed, that possibility is required by the Fourteenth Amendment to the United States Constitution.

Nevertheless, although that majority can elect, under the

Illinois Election Code it cannot nominate. Although the minority cannot elect, it can nominate.

In fact, the majority cannot really elect in Illinois. The power of a majority to elect must mean the power to elect candidates of its and not the minority's choice. Since the majority cannot nominate candidates without the support of the minority, it can only elect candidates the minority has also agreed to choose.

It is clear, therefore, that the 1935 amendment to Article 10 of the Illinois Election Code heavily overweights the electoral power of voters residing in less populous counties and greatly underweighs the electoral power of voters residing in the populous counties. The 1935 amendment deviates drastically from the rule of one man, one vote.

III.

The 1935 amendment to Section 3 of Article 10 of the Illinois Election Code violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The facts presented in the instant case are virtually identical to those present in the 1948 case of *MacDougall* v. *Green*, 335 U. S. 281. The facts vary only in that in 1948 the five most populous Illinois counties had 59 per cent of the registered voters; in 1968 they had 61 per cent. In 1948 the forty-nine most populous counties had 87 per cent of the registered voters; in 1968 they had 93.4 per cent. As in the instant case, plaintiffs in the *MacDougall* case were seeking to be certified to the county clerks for a Federal and statewide election without obtaining 200 signatures from each of 50 counties as required by the 1935 amendment to Article 10 of the Illinois Election Code. In the twenty years since the *MacDougall* case, however, the law has changed considerably.

The Supreme Court in the *MacDougall* case, by a vote of six to three, affirmed the District Court's denial of an interlocutory injunction and dismissal of the complaint on the basis of *Colegrove* v. *Green,* 328 U. S. 549 (1946) and *Colegrove* v. *Barrett,* 330 U. S. 804 (1946). Justice Rutledge concurred with the majority on the ground that the Court should decline to exercise its jurisdiction in equity. Justice Douglas, with whom Justices Black and Murphy concurred, dissented and, as noted below, the statement of the law urged in that dissent is now the law of the land.

It may be that Justice Frankfurter's opinion at page 554 in the 1946 *Colegrove* case that judicial enforcement of equality of voting power would constitute "pernicious . . . judicial intervention in an essentially political contest dressed up in the abstract phrases of the law" actually stated the ruling of that case. If it did, the Supreme Court, in the 1962 case of *Baker* v. *Carr, supra,* drastically changed the focus for viewing cases which involve political issues. The question in such cases, said the Court at page 226, "is the consistency of state action with the Federal Constitution." The Court held that complainant's allegation that the state's apportionment act resulted in a classification of voters which favored those in some counties over others presented a justiciable cause of action under the equal protection clause of the Fourteenth Amendment.

Since the *Baker* decision, the Supreme Court and many District Courts have held numerous state statutes which classified voters and weighted votes on the basis of place of residence for purposes of nomination or election to be unconstitutional, enjoined their enforcement, and ordered elections consistent with the principle of one man, one vote. (See Annotation, "Inequalities In Population Of Election Districts Or Voting Units As Rendering Apportionment Unconstitutional, 12 L. ed. 2d 1282).

In *Reynolds* v. *Sims,* 377 U. S. 533 (1964), the Court

affirmed the holding of a three-judge court that the existing and proposed apportionment provisions for the Alabama legislature were unconstitutional because they conflicted with the equal protection clause of the Fourteenth Amendment, and affirmed its order for a temporary reapportionment. The existing and proposed statutes apportioned state representatives and senators among districts and counties so that voters in the more populous counties did not elect their proportionate share of representatives and senators. The Court stated at p. 555:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The Court dealt squarely with the unconstitutionality of place of residence requirements such as that of the 1935 amendment to the Illinois Election Code. "Diluting the weight of votes because of place of residence," the Court said at page 566, "impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . ." Not place of residence but "population," the Court held at page 567, "is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

The Court left no doubt as to how the issues in *MacDougall* v. *Green, supra,* were to be decided under the laws as stated in the *Reynolds* case. In footnote 40 at page 563 in the *Reynolds'* case, the Court quoted as follows from Justice Douglas's dissent in the *MacDougall* case:

> "(A) regulation . . . (which) discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which

the exercise of political rights is entitled under the Fourteenth Amendment.

"Free and honest elections are the very foundation of our republican form of government. . . . Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. . . .

"None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government."

In *Gray* v. *Sanders,* 372 U. S. 368 (1963), the Court held that the Georgia county unit system in statewide primary elections was unconstitutional since it resulted in a dilution of the weight of some votes merely because of where the voters resided. The Court said at pages 557-58:

"How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or in the smallest rural county. Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment."

Here, the geographical unit chosen for nomination and election of Presidential Electors is the State of Illinois. All registered voters must have equal power to nominate and elect, "wherever their home may be in the geographical unit."

During the oral argument on apportionment of a three-judge court before Judge Lynch in the instant case, counsel for Defendants attempted to distinguish the veritable avalanche of decisions which have followed the *Baker* and *Reynolds* cases by arguing that the instant case involved merely the question of getting on the ballot, not an actual election. He suggested that the 1935 amendment could not be unconstitutional under the equal protection clause of the Fourteenth Amendment because voters for the independent candidates could write in the candidates' names. Apparently, a law restricting the names which appear on the ballots to candidates of either the Democratic or Republican party also could not be unconstitutional under the equal protection clause since the names of any other candidates could be written in at the election.

Such a contention, however, does not have to be attacked solely on the ground of absurdity. Article 10 of the Illinois Election Code contains the only procedure for the nomination of candidates by voters who are not members of established political parties. It permits the forming of new parties and the nomination of independent candidates by nominating petitions. Under the Illinois Election Code the procedure of nominating by petition under Article 10 is as much an integral part of the whole elective system as are the primary provisions for established parties set out in Articles 7, 8, and 9.

The Illinois Supreme Court has recognized explicitly the role of the nominating process in the elective process. In *People* v. *Election Commissioners,* 221 Ill. 9, 18 (1906), the Court stated unequivocally:

> "The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, *and is of precisely the same nature.*" (Emphasis added.)

Similarly, in *The People* v. *Fox,* 294 Ill. 263 (1920), the Illinois Supreme Court held the Primary Act of 1919 unconstitutional as contrary to Section 18 of Article II of the Illinois Constitution, saying at page 268:

> "Section 18 of the bill of rights provides that all elections shall be free and equal. This language has been construed by this court as meaning that the vote of every qualified elector shall be equal in its influence with every other one. . . . It is well settled in this state that the term 'election' applies to a primary for the nomination of candidates as well as to the election of such candidates to office, and the right to choose candidates for public office, whose names are to be placed on the official ballot, has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature."

It is well settled that where a party primary is an integral part of the procedure of election, the right to vote in a primary is a right protected by the United States Constitution. *United States* v. *Classic,* 313 U. S. 299, 314, 318 (1941). In *Smith* v. *Allwright,* 321 U. S. 649, 664 (1944), the Court stated:

> "When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election."

Following *Baker* v. *Carr, supra,* the Court has applied the same tests to determine the character of discrimination or abridgement in statutes governing the nomination of candidates as in their election. As already noted, *Gray* v. *Sanders, supra,* found unconstitutional a county unit system in statewide primary elections. The Court there held at pages 374-75 that "state regulation of this preliminary phase of the election process makes it state action" within the meaning of the Fourteenth Amendment. In *Toombs*

v. *Fortson,* 205 F. Supp. 248 (DC Ga., 1962), the Court held unconstitutional a statute which rotated senatorial seats among the counties and permitted only voters in the county selecting the state senator to vote in the primary nominating the senator. In *Moore* v. *Moore,* 229 F. Supp. 435 (DC Ala., 1964), the Court held unconstitutional a statute which provides for election of congressmen at-large but which provides for nomination of congressional candidates from districts with unequal populations.

In *Socialist Labor Party* v. *Rhoades,* just decided by a three-judge U. S. District Court for the Southern District of Ohio, several provisions of the Ohio election laws were held to be unconstitutional, including a requirement respecting petitions for nominations of independent candidates for presidential electors. The Court stated:

> "To the extent that the Ohio Election Laws impose unreasonable restrictions on the qualifications of political third parties, restrict minority participation in Ohio's electoral process, prevent candidates for president and vice-president from qualifying as independents and deprive plaintiffs of their right of suffrage, either by denial of ballot position or effective write-in, they are unconstitutional and void."

As Justice Douglas stated in his dissent in *MacDougall* v. *Green, supra,* at page 288:

> "The protection which the Constitution gives voting rights covers not only the general election but also extend to every integral part of the electoral process, including primaries. (Citing cases.) When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part."

The foregoing review of some of the leading cases subsequent to *Baker* v. *Carr* makes it evident that while the

facts in the instant case are virtually identical to those in *MacDougall* v. *Green*, the holding in the latter case no longer determines the issues they present. In *MacDougall* v. *Green*, the Court held at page 283:

> "It is clear that the requirement of two hundred signatures from at least fifty counties gives to the voters of the less populous counties of Illinois the power completely to block the nomination of candidates whose support is confined to geographically limited areas. But the State is entitled to deem this power not disproportionate: of 25,000 signatures required, only 9,800, or 39%, need be distributed; the remaining 61% may be obtained from a single county. And Cook County, the largest, contains not more than 52% of the State's voters. It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality."

All that remains of that holding is the conclusion that the 1935 amendment enables voters from less populous counties to block the nomination of candidates whose support is confined to a majority of the population which resides in geographically limited areas. It is no longer allowable State policy to permit a minority of the voters, simply because of where they reside, to block the nomination of candidates supported by a majority:

> "Citizens," said the Court at page 580 in *Reynolds* v. *Sims*, *supra*, "not history of economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal population principle. Again, people, not land or trees or pastures vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical consideration."

Since the "right to vote freely for a candidate of one's choice is of the essence of a democratic society," as the Court said at page 555 of *Reynolds* v. *Sims*, *supra*, then the

method of choosing that candidate must meet the test of the equal protection clause of the Fourteenth Amendment. Under the 1935 amendment to Article 10 of the Illinois Election Code, petitions signed by every one of the 93.4 percent of the state's qualified voters who reside in the most populous counties could not nominate a single candidate for Presidential Elector. On the other hand, petitions signed by 25,000 of the 6.6 per cent of the state's qualified voters properly distributed in fifty of the fifty-three least populous counties could nominate a complete slate of candidates. Such classification of voters on the basis of where they live is contrary to the equal protection clause of the Fourteenth Amendment and is, therefore, unconstitutional.

IV.

The invalidation of the 1935 amendment would leave the Illinois Election Code intact in its original form. Plaintiffs have fulfilled the requirements of that Code.

The only provision assailed as unconstitutional in this suit is the 1935 amendment to Article 10 of the Illinois Election Code which requires that 200 signatures be obtained from each of 50 counties. The invalidation of this amendment as unconstitutional would not nullify the entire Illinois Election Code. Instead, it would leave the legislation intact in its original form. *People* v. *Alteric*, 356 Ill. 307 (1934). The Code would then only require that 25,000 qualified voters sign a petition to nominate independent candidates for Presidential Electors regardless of their place of residence.

Plaintiffs presented such a petition to the State Electoral Board. That Board refused to certify Plaintiffs to the county clerks solely because the petition failed to satisfy the unconstitutional place of residence requirements of the 1935 amendment. (Exhibit A to Complaint.) Plaintiffs, therefore, have fulfilled the constitutional statutory re-

quirements for certification and should be certified to the county clerks as Electors of President and Vice-President of the United States. Since ballots will soon be printed for the November 5, 1968 general election, Plaintiffs will not be so certified unless this Court declares the right of Plaintiff to be so certified and enjoins Defendants from declining or refusing so to certify them.

Since Sidney T. Holtzman, chairman of the board of election commissioners has stated that bids for printing the ballots will be opened on September 26, 1968 and printing will begin immediately thereafter (Chicago Sun Times, September 20, 1968, page 72), a Preliminary Injunction is essential in order to preserve Plaintiff's constitutional rights.

Conclusion.

For all of the reasons argued above, Plaintiffs respectfully submit that their prayer for declaratory and injunctive relief as set forth in their Complaint should be granted and that the Court grant Plaintiffs' motion for a Preliminary Injunction.

Respectifully submitted,

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(Affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT.

(Title omitted in printing.)

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS.

ARGUMENT.

The Illinois Statute Represents a Rational State Policy.

The traditional test of constitutionality under the Equal Protection Clause has been whether a State has made "an invidious discrimination." [See *Skinner* v. *Oklahoma,* 316 U. S. 535; *Williamson* v. *Lee Optical Co.,* 346 U. S. 483.] In *MacDougall* v. *Green,* 335 U. S. 281 (1948), the Supreme Court applied this very test and held that the same statute now challenged in this case represented a rational State policy. It stated:

> "It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality. This is not a unique policy. [Citations omitted.] To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the State.* *" (335 U. S., at 283, 284.)

The population distribution in Illinois has not changed significantly to undercut the determination of rationality made in *MacDougall*. For example, plaintiffs allege in their present complaint that more than half the registered voters in Illinois reside in one county. (*Complaint*, par. 9). However, in 1948 when *MacDougall* was decided, more than half the voters in Illinois also resided in only one county. (335 U. S., at 283.) Likewise, whereas 61% of the State's voters are now allegedly registered in five counties (*Complaint*, par. 10), in 1948 a total of 59% of the voters resided in the same five counties. (*Complaint*, par. 34, *MacDougall* v. *Green*, U. S. Dist. Ct., N. D. of Ill., No. 48C-1406). Finally, in the instant Complaint, plaintiffs allege that 93.4% of the voters reside in 49 counties (Par. 11); in 1948 a total of 87% of the voters resided in the 49 most populous counties of Illinois. (335 U. S., at 283.)

In other words, what the U. S. Supreme Court held to be a rational State policy in 1948 must now, plaintiffs assert, be held to reflect *no* rational State policy and to amount to invidious discrimination—this despite only insignificant population changes within Illinois since 1948. Plaintiffs give no reason why this Court should now find no policy when the Supreme Court on substantially the same facts found a rational policy, and *MacDougall* is dispositive of all issues which plaintiffs have raised.

The plaintiffs will undoubtedly contend that the more recent cases of *Baker* v. *Carr* [369 U. S. 186 (1962)], *Reynolds* v. *Sims* [377 U. S. 533 (1964)] and *Avery* v. *Midland* [36 L. W. 4257 (1968)] now compel a different conclusion than the one reached in *MacDougall*. Those cases, however, are inapposite. In *Baker* the Supreme Court merely decided that jurisdictional objections should not preclude a Federal court from hearing an action wherein it was claimed that equal protection had been violated in connection with voting rights. In contrast to this decision,

MacDougall was decided on its merits and not on jurisdictional grounds. *Reynolds* holds that the right to vote is infringed when legislators are elected from districts of substantially unequal populations, and *Avery* merely extended the *Reynolds* holding to the political subdivisions of the State. All three decisions involved the right of citizens to vote, a right held therein to be constitutionally protected, whereas in this case we are concerned with the right to nominate, and not the right to vote. If in fact an Illinois citizen had some absolute constitutional right to nominate, as apparently the plaintiffs are contending, then it would be unconstitutional to provide, as has Illinois and many other states, that the electors should be chosen by the political parties at a State Convention. [1967 Ill. Rev. Stat., Ch. 46, § 21-1-(a)]. However, this case does not present any clear issue of whether the right to nominate is constitutionally protected, since the plaintiffs are not the signatories of these petitions, but rather the prospective candidates for electors. Nowhere does it appear that the plaintiffs are asserting the rights of those persons who signed plaintiffs' petitions, and even if the plaintiffs had attempted to assert such rights, they would lack standing to do so. Thus, even if there were authority for the proposition that the right to nominate is constitutionally protected, that issue is not presently presented by this case. Although the plaintiffs assert that the right to vote for them is in fact involved here, such an assertion is based on a misunderstanding of the Illinois Election Code. The Code specifically provides that the names of the electors are not to be placed on the ballot, and the voters will vote not for electors but rather for a presidential and vice presidential candidate. [1967 Ill. Rev. Stat., Ch. 46, § 21-1 (b)]. No such presidential and vice presidential candidates have been named by the plaintiffs, as far as this record shows, and therefore the right to vote is not involved herein at all.

The true issue presented by this case is whether the plaintiffs, prospective electors, have been denied equal protection of the law by virtue of the fact that they are required to show a base of support in any fifty counties of this State. The statute does not require that such petitions be distributed in the least populated counties, nor does it require that the petitions show signatures from the most populated counties. Nothing appears in this case to show that the least populated counties have in fact blocked the plaintiffs' prospective candidacy, and in fact from all that appears plaintiffs have made absolutely no attempt to obtain support in 50 counties of this State. The Illinois Election Code uniformly requires that any group, whether it be an independent group such as the plaintiffs, or a group starting a particular political party, show a base of support in any fifty counties of this State. [1967 Ill. Rev. Stat., Ch. 48, § 10-2]. The very fact that presidential candidate George Wallace has complied with this very provision, and has submitted signatures from fifty counties, shows that such can be done without great difficulty, and that such a provision is not meant to perpetuate certain individuals in office. The challenged provision in the Election Code works uniformly on all groups, without distinction on the basis of race, creed, economic status or location, and there is no way a denial of equal protection in the treatment accorded the plaintiffs. The mere fact that there are inequalities in population between political subdivisions does not *per se* invalidate an election scheme involving those subdivisions. See *Dusch* v. *Davis*, [387 U. S. 112 (1967)], where the Court permitted a city to choose its legislative body by a scheme that included at large voting for candidates, some of whom had to be residents of particular districts, even though the districts varied widely in population.

For these reasons the defendants submit that the plaintiffs have failed to state a claim, and the defendants ask therefore that the complaint be dismissed.

Respectfully submitted,

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(Affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

JAMES L. MOORE, et al.,
Plaintiffs,
vs.
SAMUEL SHAPIRO, et al.,
Defendants.

No. 68 C 1569.

ORDER.

This action was brought before a three-judge District Court convened in the Northern District of Illinois under 28 U. S. C. §§ 2281 and 2284 by twenty-six independent candidates for the offices of Presidential and Vice Presidential electors from the state of Illinois. Defendants are the members of the Illinois Electoral Board.

On August 5, 1968 plaintiffs filed nominating petitions signed by 26,500 qualified voters pursuant to the provisions of Illinois Revised Statutes, Ch. 46 § 10-3. Defendants ordered the county clerks to refuse to certify plaintiffs for the November 5, 1968 General Elections because plaintiffs' petition did not comply with the provisions of Section 10-3 of Chapter 46, Illinois Revised Statutes 1967. This Section, along with Section 10-2 of the same Chapter, was amended in 1935 by the addition of the following qualification:
"Provided that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties."

Plaintiffs herein are seeking a Declaratory Judgment pursuant to 28 U. S. C. § 2201, holding the above proviso

unconstitutional; declaring the action of the Electoral Board in refusing to order certification of plaintiffs by the county clerks null and void; and declaring plaintiffs' petition valid and sufficient for nomination. The Complaint further seeks an injunction under 28 U. S. C. § 2202, prohibiting defendants from refusing to certify plaintiffs to the county clerks for nomination.

Having jurisdiction of the subject matter and having considered the briefs and authorities submitted by the parties, the Court feels itself bound by *MacDougall* v. *Green*, 335 U. S. 281 (1948), wherein the Supreme Court upheld an identical provision, stating that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." 335 U. S. 283.

IT IS HEREBY ORDERED:

1. That the prayer for Temporary Injunction is denied.
2. That the prayer for Declaratory Judgment is denied.
3. That the complaint is dismissed for failure to state a cause of action.

A memorandum decision will be issued soon.

Enter:

/s/ JOHN S. HASTINGS,
Circuit Judge, United States Court of Appeals.

/s/ BERNARD M. DECKER,
Judge, United States District Court.

/s/ WILLIAM J. LYNCH,
Judge, United States District Court.

Dated: October 1, 1968.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

JAMES L. MOORE, et al.,
Plaintiffs,
vs.
SAMUEL SHAPIRO, et al.,
Defendants.
No. 68 C 1569.

MEMORANDUM OF DECISION.

Before Hastings, Circuit Judge, Decker and Lynch, District Judges.

Per Curiam: This action was brought before a three-judge District Court convened in the Northern District of Illinois under 28 U. S. C. §§ 2281 and 2284, by twenty-six independent candidates for the offices of Presidential and Vice Presidential electors from the state of Illinois. Defendants are members of the Illinois Electoral Board.

On August 5, 1968 plaintiffs filed nominating petitions signed by 26,500 qualified voters. Defendants ordered the county clerks to refuse to certify plaintiffs for the November 5, 1968 General Elections because plaintiffs' petition did not comply with certain provision of Section 10-3 of Chapter 46, Illinois Revised Statutes 1967. This Section, along with Section 10-2 of the same Chapter, was amended in 1935 by the addition of the following qualification: "Provided that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties." Plaintiffs' petition did not contain signatures of 200 such voters from each of 50 counties.

Plaintiffs herein are seeking a Declaratory Judgment, pursuant to 28 U. S. C. 2201, holding the above proviso unconstitutional, declaring the action of the Electoral Board in refusing to order certification of plaintiffs by the county clerks null and void; and declaring plaintiffs' petition valid and sufficient for nomination. The Complaint further seeks an injunction, under 28 U. S. C. 2202, prohibiting defendants from refusing to certify plaintiffs to the county clerks for nomination.

JURISDICTION.

An identical 1935 Amendment qualifying Section 10-2, Ch. 46, Illinois Revised Statutes, 1967 which prescribes the requirements for nominating an independent third party, was challenged before the Supreme Court twenty years ago in *MacDougall* v. *Green*, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 3. A three-judge District Court therein had previously dismissed the action for lack of jurisdiction. The Supreme Court affirmed *after* a hearing on the merits. Commenting on this apparent inconsistency, Justice Brennan, in the majority opinion of *Baker* v. *Carr*, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, noted the Supreme Court's disagreement with the District Court's finding of a lack of jurisdiction. 369 U. S., at 203.

The *MacDougall* and *Baker* cases are controlling on the issue of jurisdiction in present action. Voting rights are secured by the Equal Protection Clause of the Fourteenth Amendment. The Federal District Courts have jurisdiction under 28 U. S. C. § 1343 (3) "... to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." This grant clearly gives this Court jurisdiction to hear the matter before it.

THE CONSTITUTIONAL ISSUE.

The provision of the Illinois Election Code being challenged in this action was found to be constitutional by the Supreme Court of the United States in the case of *MacDougall* v. *Green, supra*. In *Baker* v. *Carr, supra,* Justice Brennan noted the Supreme Court's prior decision thusly:

> "In *MacDougall* v. *Green* (cite omitted), the District Court dismissed for want of jurisdiction, which had been invoked under 28 U. S. C. § 1343 (3), 28 U. S. C. A. § 1343 (3), a suit to enjoin enforcement of the requirement that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties. This Court's disagreement with that action is clear since the Court affirmed the judgment after a review of the merits and concluded that the particular claim there was without merit." 369 U. S., 203.

The facts of the *MacDougall* case and the case before the bar are virtually identical except for insubstantial shifts in the concentration of population in the various Illinois counties.[1] Plaintiffs in this case, while admitting that the *MacDougall* decision bears directly against them, contend that the holding of the *MacDougall* case should be disregarded on the theory that the line of cases beginning with *Baker* v. *Carr* in 1962 has overruled the *MacDougall* decision by implication.

Justice Clark, concurring in the decision of the majority in *Baker,* was able to distinguish that case from *MacDougall* (and, therefore, also from the instant case) thusly:

---

1. Both plaintiffs in the present case and in the *MacDougall* case alleged that more than half of the registered voters in Illinois reside in one county. (Complaint, Par. 10; 355 U. S., at 28). Plaintiffs presently allege that 61% of the State's voters are now registered in five counties compared with 59% in the same five counties in 1948. (Complaint, par. 34; *MacDougall* v. *Green,* U. S. Dist. Ct., N. D. of Ill., No. 48 C 1406). Plaintiffs allege that 93.4% of the voters reside in 49 counties compared with 87% in the same 49 counties in 1948. (Complaint, par. 11; 355 U. S., at 283).

> "I take the law of the case from *MacDougall* v. *Green* (cite omitted), which involved an attack under the Equal Protection Clause upon an Illinois election statute. The Court decided the case on its merits without hindrance from the 'political question' attack. Although the statute was upheld, it is clear that the Court based its decision upon the determination that the statute represents a rational state policy." 369 U. S., at 251, 252.

Justices Clark and Stewart agreed that the Tennessee apportionment statute under attack was, contrary to the Illinois statute in *MacDougall,* totally unreasonable and arbitrary.

Ordinarily, discovery of precedent in the form of a Supreme Court decision squarely on point determines an issue. However, in the area of voting rights today we must go further and ask whether or not what was considered to be a "rational state policy" in 1948 is still considered as such today.

It is clear that Justices Clark and Stewart concurring in the *Baker* decision, were of the opinion that apportionment of a state legislature, if done on a rational basis, need not be based strictly on population. However, a more strict approach has evolved from subsequent Supreme Court cases. Today, the apportionment of legislative representation in virtually all levels of government must be based on population as nearly as possible. See *Wesbury* v. *Sanders,* 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481; *Reynolds* v. *Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506; *Avery* v. *Midland,* 36 L. W. 4257 (1968).

Some divergence from this standard is necessary, but the character and amount of such divergence which will be tolerated is unclear. Chief Justice Warren, in *Reynolds* v. *Sims, supra,* has pointed out that the Supreme Court presently deems it:

> "expedient not to spell out any precise constitutional

> tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the more satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment. 377 U. S., at 578.

While it is clear that constitutional standards in this area may vary among the national, state, county and municipal levels as well as from State to State, we find some guidance from a 1967 Supreme Court case.

The case of *Dusch* v. *Davis*, 387 U. S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656, involved a local plan consolidating the City of Virginia Beach and Princess Anne County into a new governmental unit of seven boroughs which vary considerably in population. The plan (called the "Seven-Four Plan") created an eleven-member city council elected at large. Each of seven council members must reside in a different one of the boroughs.

Plaintiffs therein alleged that the plan violated "the principles of *Reynolds* v. *Sims*." The District Court approved the plan, but the Court of Appeals for the Fourth Circuit reversed, 361 F. 2d at 497. The Supreme Court upheld the District Court. Justice Douglas, writing the opinion of the Court, found that "the plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' " 387 U. S., at 115. The Court further noted that "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolous in relation to the city, the suburbia, and the rural countryside." 387 U. S., at 117. No invidious discrimination was found in the plan.

The "Seven-Four Plan" and the challenged Illinois Election Code provision share the same underlying prin-

ciples—they are but different means to the same effect. The District Court in the *Dusch* case decided that:

> "The Seven-Four Plan is not an evasion scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population."

This description applies equally well to the residence requirements within Sections 10-2 and 10-3 of the Illinois Election Code. The purpose of these provisions is obviously to require a state-wide candidate to show minimal state-wide support. An elected official on the state level represents all the people in the state. Such representatives should be aware of and concerned with the problems of the whole State and not just certain portions thereof. This is the policy behind the challenged provision; it is a rational policy. It is accomplished without undue burden on the potential candidates and without unnecessary interference with the weight or the effectiveness of an Illinois citizen's right to vote.

In fact the right to vote in Illinois would only be unreasonably affected if, somehow, virtually entire populations of 53 of the lesser populated counties decided to preclude a majority of the State's qualified voters from nominating candidates of their choice. This does not appear likely. If such schemes ever came to light, the situation can be re-examined.

Thus, this Court finds that Section 10-3 of the Illinois Election Code, Ch. 46, Illinois Revised Statutes 1967, is an expression of rational state policy and that, therefore, it is constitutional under *MacDougall* v. *Green, supra.* As was pointed out in *Baker* v. *Carr, supra,* "*MacDougall* v. *Green,*

(cite omitted), held only that in that case, equity would not act to void the State's requirement that there be at least a minimum of support for nominees for state-wide office, over at least a minimal area of the State." 369 U. S., at 234. This Court agrees with that course of action and follows the same in dismissing the present Complaint.

In sum, plaintiffs contend that, although the case of *MacDougall* v. *Green, supra,* is a direct precedent against their constitutional claims, the Supreme Court today would overrule *MacDougall* v. *Green* and that, in effect, we should hold this precedent not to be controlling. The short answer to this is that the Court itself has cited *MacDougall* v. *Green* in a number of recent decisions and has considered it to be a holding on its merits and has not set aside such a determination. We do not deem it to be our function to second guess and overrule a standing precedent in the identical case now before us. We believe that to be the sole prerogative of the Supreme Court and we respectfully decline to usurp that function.

/s/ John S. Hastings,
Circuit Judge, United States Court of Appeals.

/s/ Bernard M. Decker,
Judge, United States District Court.

/s/ William J. Lynch,
Judge, United States District Court.

Dated: Oct. 3, 1968.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

JAMES L. MOORE, et al.,
Plaintiffs,
vs.
SAMUEL SHAPIRO, et al.,
Defendants.

Civil Action No.
68 C 1569.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that the Plaintiffs herein, by and through their attorneys, hereby appeal to the Supreme Court of the United States from the final order of the three-judge court dismissing the complaint and denying temporary and permanent injunctive relief, such order being entered in this action on October 1, 1968.

This appeal is taken pursuant to 28 U. S. C. A. § 1253.

The Clerk of the United States District Court for the Northern District of Illinois has been asked to prepare and certify a transcript of record consisting of all the original papers, documents and orders in the case.

The following questions are presented by this appeal:

Does the 1935 Amendment to Section 3 of Article 10 of the Election Code of Illinois, requiring that nomination petitions for independent candidates for state-wide office must contain not less than 200 signatures from each of at least 50 counties, constitute an arbitrary, unreasonable, and discriminatory restriction on the right of the Illinois voters to nominate and vote for candidates of their own choice in violation of Amendment XIV to the United States Constitution, and particularly the privileges and immunities,

equal protection of the laws and the due process clauses thereof?

Is the Supreme Court's decision in *MacDougall* v. *Green*, 335 U. S. 231 (1948) still the law? Has not Justice Douglas' dissent in that case now been adopted by the Supreme Court as a valid statement of the principles governing this cause?

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